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May 3, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: **Worker Appeal**

Date of Filing: **October 27, 2004**

Case No.: **TIA-0291**

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant did not have an illness related to work at the DOE. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the Appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a physician panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a physician panel determination in favor of an applicant. The instant appeal was filed pursuant to that section. The Applicant sought review of a negative determination by a physician panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant worked at the Oak Ridge K-25 for about 12 months, from October 1944 to June 1945, and from August 1945 to December 1945. The Applicant filed a Subpart B application with DOL, claiming skin cancer. The Applicant filed a Subpart D application with OWA, claiming skin cancer, rash-skin condition on legs, back pain due to being injected with plutonium, arthritis, hearing loss and chronic bronchitis.

The OWA referred the application to the Physician Panel, which issued a negative determination. The Panel found that the Applicant had skin cancer (on her cheek) but found that the skin cancer was not related to her DOE employment. The Panel found insufficient evidence of the other claimed conditions.

The OWA accepted the negative determination, and the Applicant filed an appeal. The Applicant objects to site records showing treatment in the infirmary, stating that she was never treated in the infirmary. The Applicant also argues that the Panel

determination is inconsistent with "expert medical opinions" that her illnesses are related to her DOE employment.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant's argument that she was never treated at the site infirmary does not indicate OWA or Panel error. The site infirmary records clearly state the Applicant's name, *see* Record at 73-102, and the Applicant herself claims that she received treatment at the infirmary, *see id.* at 11, 39. More importantly, the absence of the infirmary records would not have affected the Panel determination. The Panel discusses the records in its discussion of the Applicant's claims of "back pain due to being injected with plutonium" and chronic bronchitis. For both illnesses, the Panel found a lack of documentation to support the claimed diagnoses.[1] That lack of documentation would continue to exist even in the absence of the infirmary records.

The Applicant's argument that the Panel decision is inconsistent with expert medical opinions is not supported by the record. Two physicians opined that various complaints "may" or "could" be related to toxic exposures, *see* Record at 36-38, a more relaxed causation standard than the Rule's "at least as likely as not" standard. 10 C.F.R. § 852.8. A third physician, rather than giving an opinion, stated that the Applicant should be evaluated by a specialist. *See id.* at 39. Finally, a fourth physician reported on "badly sun-damaged" skin, *id.* at 40, which is consistent with the Panel finding that the Applicant's skin cancer was not related to toxic exposure at DOE.

As the foregoing indicates, the Applicant's arguments do not indicate panel error. Accordingly, the appeal should be denied.

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[1] **For the claimed back pain due to being injected with plutonium, the Panel suggested that the Applicant have her urine tested for plutonium.**

In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0291, be, and hereby is, denied.

(2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 3, 2005